IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

AMERICAN FEDERATION OF STATE, COUNTY, MUNICIPAL EMPLOYEES, COUNCIL 81,	)	
Plaintiff in Error,	)	
v.	)	C.A. No. 09A-06-014 JRS
DELAWARE PUBLIC EMPLOYMENT RELATIONS BOARD,	)	Writ of Certiorari
and	)	
STATE OF DELAWARE, BOARD OF ELECTIONS,	)	
Defendants in Error.	)	

Date Submitted: December 1, 2009
Date Decided: March 11, 2010

MEMORANDUM OPINION

Upon Consideration of Defendant's
Motion to Dismiss.
GRANTED.

Perry F. Goldlust, Esquire, PERRY F. GOLDLUST, P.A., Wilmington, Delaware. Attorney for Plaintiff in Error.

Ilona Kirshon, Esquire, State of Delaware Department of Justice, Wilmington, Delaware. Attorney for Defendants in Error.

SLIGHTS, J.

I.

Before the Court is a Motion to Dismiss filed by the Defendants in Error, State of Delaware Board of Elections and the Delaware Public Employee Relations Board (the "PERB")(collectively "the State"). The motion seeks dismissal of the Petition for Writ of Certiorari filed by the American Federation of State, County, Municipal Employees, Council 81 ("Council 81"), in which Council 81seeks review of the PERB's ruling that the Board of Elections Senior Voting Machine Technician ("SVMT") position is excluded from collective bargaining units under the Public Employment Relations Act ("PERA"). Upon review of the motion and the response thereto, for the reasons that follow, the Court has determined that the motion must be **GRANTED**.

II.

A. The Public Employment Relations Act

PERA was enacted to promote "harmonious and cooperative relationships between public employers and their employees."[1] The PERB is charged with administering PERA and assisting with disputes that arise between public employers and employees.[2] PERA granted public employees the rights of organization and

[1] 19 *Del. C.* § 1301.
[2] *Id.* at §§ 1301(3), 1306.

representation, as well as the right to engage in collective bargaining negotiations with the public employer.[3] Collective bargaining under PERA requires that both parties "confer and negotiate in good faith to terms and conditions of employment, and execute a written contract incorporating any agreements."[4]

Public employees are categorized into one of twelve bargaining units, based on the work performed in their positions. Each unit individually engages in collective bargaining with its respective public employer to determine compensation and other rights and benefits of employment. The classification occurs after an employee organization petitions the PERB for certification of exclusive representation in collective bargaining. A hearing on the petition is then held to determine the correct bargaining unit for the employees within the petitioning organization. This hearing typically is delegated to one PERB member, and is then subject to review by the PERB as a whole.[5]

Relevant definitions are set forth in § 1302 of PERA. "Public employee" is defined as any employee of a public employer, with seven exceptions, one of which includes employees in supervisory positions.[6] Supervisory employees are not eligible

[3] *Id.* at § 1301(1)-(2).
[4] *Id.* at § 1302(e).
[5] *Id.* at § 1310(a)-(c).
[6] *Id.* at § 1302(o).

for collective bargaining.[7] PERA defines a "supervisory employee" as one:

> who has the authority, in the interest of the public employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such actions, if the exercise of such authority is not a merely routine or clerical nature, but requires the use of independent judgment.[8]

B. The Classification Of Senior Voting Machine Technicians

This controversy arises from the PERB's January 2008, initial classification of Board of Elections SVMTs as part of Bargaining Unit 1 (labor, maintenance, trade and service workers).[9] The State objected to the designation, arguing that these employees were, in fact, supervisory employees and, therefore, ineligible for inclusion in a bargaining unit under PERA.[10] The PERB's Executive Director presided over a factual hearing to address the State's objection and handed down a decision classifying SVMTs as supervisory and thereby excluding SVMTs from collective bargaining.[11]

The definition of "supervisory employee," and the exclusion of supervisory employees from bargaining units in PERA, are taken directly from the federal

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[7] *Id.* at § 1310(d).
[8] *Id.* at § 1302(s).
[9] Def.'s Mot. to Dismiss 1.
[10] *Id.* at 2.
[11] *Determination of Eligibility for Inclusion in § 1311A Merit Unit #1*, Rep. Pet. 07-12-608(b), at 4229, 4243 (Del. PERB May 6, 2009) [hereinafter *Determination of Eligibility*].

National Labor Management Relations Act ("NLMRA"), which is administered by the National Labor Relations Board ("NLRB").[12] Given its origin, the Executive Director looked to the NLRA for guidance when interpreting PERA. She noted that "where Delaware law mirrors federal statutes (as is the case with § 1302(s)), Delaware can reasonably be expected to follow the precedent established in the federal sector."[13] In designating SVMTs as supervisory employees, the Executive Director did not consider the State of Delaware Merit Rules ("the Merit Rules"), adopted by the Merit Employees Relation Board on January 1, 2004. The Merit Rules contain a definition of supervisor that is substantially different from the definition set forth in PERA.[14] The Executive Director noted that PERA, unlike Merit Rule 19.0, does not specifically exclude seasonal or causal employees from the scope of "public employee[s]" over whom the supervisor exercises authority for purposes of determining "supervisory employee" status. In deciding to follow the boarder PERA definition, she noted the different purposes for which PERA and the Merit Rules

[12] *Id.* at 4236.
[13] *Id.* (citing *CoFrancesco v. City of Wilmington*, 419 F. Supp. 109, 111 (D. Del. 1976)).
[14] *Compare* Del. Merit R. 19.0, *available at* http://delawarepersonnel.com/mrules/documents/mrules_complete_073109.pdf (defining "supervisor" as: "a person in a position who, on a regular and continuing basis, plans, assigns, reviews, disciplines, recommends hire, termination and promotion and completes and approves performance plans of two or more classified employees excluding casual, seasonal and contractual employees"), *with* 19 *Del. C.* § 1302(s) (defining "supervisory employee" for purposes of PERA in terms that do not focus on the employment status of the employees over whom the supervisor exercises authority).

definitions were adopted: "the Merit Rule is used for purposes of classification and pay grade assignment, while the PERA definition is functional and clearly without the limitations on number and status of subordinates."[15]

The Director noted that the PERB is "charged with interpreting and applying the statutory definitions" found in PERA.[16] In its decision in *Division of State Police Communications Section*, the PERB adopted a three part analysis for determining "supervisory" authority: (1) Does an employee in this position have the authority to engage in one or more of the twelve listed activities; (2) If so, does the exercise of this authority require the use of independent judgment; and (3) Does the employee hold the authority in the interest of the public employer?[17] The Executive Director applied this analysis in determining whether SVMTs perform supervisory functions by looking at the record and the job description for the position. She examined each of the twelve activities listed in the definition of supervisor and determined that one of these activities, responsibility to assign work, was performed by the SVMT.[18]

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[15] *Determination of Eligibility*, Rep. Pet. 07-12-608(b), at 4238.
[16] *Id.*
[17] *Div. of State Police Commc'ns Section*, Rep. Pet. 96-07-187, at 1542, 1548 (Del. PERB Jan. 8, 1996).
[18] *Determination of Eligibility*, Rep. Pet. 07-12-608(b), at 4241. The Executive Director took the definition of "assign" from NLRB's *Oakwood* analysis: ". . . the act of designating employees to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period) or giving significant overall duties, i.e., tasks to an employee . . ." *Id.* (citing *Oakwood Healthcare, Inc.*, 348 NLRB 686, 689 (2006)).

Accordingly, she determined that the SMVT position is, in fact, supervisory because SVMTs have the "authority, in the interest of their employer, to assign work to casual/seasonal employees and that they do exercise judgment in such assignment."[19]

The Executive Director's decision was affirmed after review by the full PERB, which found substantial evidence to support the designation of SVMT as a supervisory position. The PERB did not incorporate the Merit Rule definition of supervisory employee in its decision.[20]

Since PERA does not provide for an appeal outside of the agency, Council 81 has filed a Petition for Writ of Certiorari, in which it argues that the PERB made an error of law when it applied the statutory rather than the Merit Rule definition of "supervisor." Council 81 also argues that the PERB's reliance upon NLRB policy and case law for guidance to determine whether the SVMT position was supervisory constituted an error of law because "there is specific State law on the same subject regardless of the similarity of some statutory language."[21] Finally, Council 81 argues that the classification of SVMTs as supervisory employees was erroneous because an employee in that position does not supervise Merit System employees, as required

[19] *Id.* at 4242.
[20] *Id.* at 4237-38 (discussing both the statutory and Merit Rules definitions, and ultimately applying only the statutory definition of "supervisory employee").
[21] Pl.'s Pet. for Writ of Cert. 5-6

under the Merit Rule definition of "supervisory employee."[22]

III.

The State argues that the statutory definition of "supervisor" supersedes the Merit Rule definition, citing the fundamental rule of statutory construction that where a statute and an administrative rule conflict, the statute controls.[23] The State's argument implies that if the Executive Director had found that the statute was ambiguous, she would have addressed that finding in her decision. According to the State, since the issue of ambiguity was not addressed and the statute alone was applied, one can infer that the Executive Director found the statute to be unambiguous. The State also points to the fact that the Merit Rules themselves contemplate conflicts between PERA and the Merit Rules. In this regard, the Merit Rules state: "in the event of conflict with the Delaware Code, the Code governs."[24]

The State also argues that the PERB is empowered to administer PERA through § 1306 and is charged with determining proper job classifications and the status of bargaining units under § 1311A. Therefore, it is the PERB's responsibility to apply the relevant definitions in making bargaining unit determinations. According to the State, in this case, the PERB properly analyzed the SVMT position and deemed it

[22] *Id.* Council 81 also argues that the Executive Director failed to cite any facts for which the reviewing Court could determine that her conclusions were supported by substantial evidence. *Id.*
[23] Def.'s Mot. to Dismiss 3.
[24] *Id.* (citing Del. Merit R. 1.2).

supervisory under the PERA definition, so the position was properly excluded from a bargaining unit.[25]

In its Response to the Motion to Dismiss, Council 81 argues that PERA "should be read in conjunction with other statutory laws unless there is statutory language that prevents such a harmonious reading."[26] In this case, Council 81 contends, the PERB could have read PERA and the Merit Rules harmoniously in view of the Merit System's general purpose "to establish for this State a system of personnel administration based on merit principles and scientific methods governing the employees of the State in the classified service consistent with the right of public employees to organize under [PERA]."[27] Since the general purpose of the Merit Rules directly states that it should be read in conjunction with PERA, Council 81 argues that the two should be read harmoniously. According to Council 81, to the extent the PERB attempted to read the two sections harmoniously, it committed a legal error when it classified SVMTs as supervisory because Merit Rule 19.0 specifically excludes casual and seasonal employees in its definition of supervisor, and SVMTs supervise only casual and seasonal employees. Therefore, Council 81 argues, the position cannot be considered supervisory.[28]

[25] *Id.* at 3.
[26] Pl.'s Resp. to Mot. to Dismiss 2.
[27] *Id.* (quoting 29 *Del. C.* § 5902).
[28] *Id.*

At oral argument on the State's Motion to Dismiss, Council 81 conceded that the statute should be considered first, and that the Merit Rules are implicated only if the statute is ambiguous. Council 81 argued that PERA is ambiguous because it does not expressly state in the classification of supervisor that there must be subordinates to the supervisor, nor does it quantify the percentage of time that an employee must spend performing supervisory duties in order to be considered a supervisory employee.

Council 81 also argues that the burden of proof is on the employer to show that the position is, in fact, supervisory.[29] Council 81 points to the PERB's decision in *Sussex County Emergency Operations Dispatchers*, where the PERB stated that "the burden to establish supervisory status by a preponderance of the evidence [must] be met by the party asserting that such status exists."[30] Therefore, Council 81 argues that the burden was on the State to show that the SVMT position was supervisory and that it did not carry that burden.

IV.

Review under a writ of certiorari differs greatly from review on appeal, which looks to the merits of the case, in that the reviewing court can only consider errors

[29] *Id.* at 3.
[30] Rep. Pet. 07-02-557, at 3949, 3957 (Del. PERB Feb. 14, 2008).

of law, not errors of fact.[31] The purpose of a writ of certiorari is to allow "review for a party who considers himself aggrieved by the determination of his rights by the inferior court, without or in excess of its jurisdiction or without compliance with the requirements of law, so that justice may be done for him."[32] Therefore, the review of the Court is limited to "jurisdictional matters, errors of law, or irregularity of the proceedings which appear on the face of the record."[33] A decision may be reversed for an error of law if "the record affirmatively shows that the lower tribunal proceeded illegally or manifestly contrary to law."[34] Irregularity of the proceedings is present if there was an inadequate record for review created by the lower tribunal.[35]

When there is a review of an administrative agency's interpretation of its governing statute and the application of the statute to undisputed facts, the standard of review is plenary.[36] The reviewing Court should give substantial weight, but not defer entirely, to the agency's interpretation of the statute that agency is charged to administer, provided that it is not clearly erroneous.[37] An agency's interpretation is

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[31] *Shoemaker v. State*, 375 A.2d 431, 437 (Del. 1977) (citing 1 Victor B. Woolley, *Practice in Civil Actions and Proceedings in the Law Courts of the State of Delaware* § 900, at 627-28 (1906)).
[32] *Id.*
[33] *Id.*
[34] *Christiana Town Ctr., LLC v. New Castle County*, 2004 WL 2921830, at *2 (Del. Dec. 16, 2004) (citing Woolley § 939, at 651).
[35] *Id.* (citing Woolley § 923, at 645).
[36] *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 383 (Del. 1999).
[37] *Id.* at 383 n.9.

not clearly erroneous where it is supported by substantial evidence.[38] Substantial evidence is "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion."[39]

V.

A. PERA's Definition Of "Supervisory Employee" Is Not Ambiguous

A statute is ambiguous if it is "reasonably susceptible to different conclusions or interpretations."[40] If the statute is not ambiguous, the words must be applied as written, unless such a literal application would have a result contrary to the legislative intent.[41] PERA's definition of "supervisory employee" makes no reference to the type of employee over whom the "supervisor" will exercise authority; it simply states that the supervisor must have authority over "other employees." The fact that there is no further refinement of the phrase "other employees" in the statute reflects a legislative intent not to define the classification of "supervisor" by focusing on the nature of the employees over whom they exercise supervisor authority, but rather by focusing on the nature and scope of the supervisory authority itself. This focus does not render the statute ambiguous.

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[38] *Id.*
[39] *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).
[40] *Leatherbury v. Greenspun*, 939 A.2d 1284, 1289 (Del. 2007).
[41] *Id.*

Moreover, under *CoFrancesco*, the PERB is authorized to look to applicable federal precedent for guidance. In previous cases, the PERB has repeated that "decisions rendered under federal labor statutes . . . are often useful in providing guidance and background for decision of the Delaware PERB."[42] In this case, the NLRA definition of "supervisory employee" is identical to the PERA definition of that same term.[43] Had the General Assembly wished to narrow the definition for "supervisor" from the NLRA, it would have done so when it constructed PERA. Instead, the definition is exactly the same. Therefore, the PERB and this Court can and should consider the NLRB decisions that relate to the issue *sub judice*.[44]

[42] *Div. of State Police Commc'ns Section*, Rep. Pet. 96-07-187, at 1548 n.3.

[43] 29 *U.S.C.* § 152(11) ("'[S]upervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.").

[44] The Court notes that it has not been directed to, and has not found in its own research, any decision finding either the NLRA or PERA definition of "supervisory employee" to be ambiguous. In fact, the Court has not found a single case or agency opinion that even discuses whether the definition is ambiguous. This void in the case law is in contrast to a plethora of case law and agency decisions discussing the broader issue presented here. *See, e.g.*, *Northcrest Nursing Home*, 313 NLRB 491, 491 (1993) (considering whether certain types of nurses are supervisors for purposes of collective bargaining under the NLRA); *Sussex County Emergency Operations Dispatchers*, Rep. Pet. 07-02-557, at 3957-58 (applying the PERB's sequential analysis to determine if a position qualified as supervisory under PERA); *Div. of State Police Commc'ns Section*, Rep. Pet. 96-07-187, at 1548 (same).

B. The PERB Properly Declined To Apply The Merit Rule Definition Of "Supervisory Employee"

Since the Court finds that PERA is unambiguous, the next step is to determine if the PERB's application of PERA's definition would be contrary to the legislative intent behind the statute.[45] The general purpose of PERA is "to promote harmonious and cooperative relationships between public employers and their employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public employer."[46] Applying the PERA definition of "supervisory employee" in this case does not create a result contrary to this stated intent. Neither party provided any indication, through evidence or otherwise, that the present dispute over the classification of the SVMT position has resulted in any negative consequences to either the relationship between SVMTs and the Board of Elections, or the ability of the SVMTs to perform their job functions. In the absence of ambiguity, and where literal application of PERA would not be contrary to its legislative intent, the PERB need not seek out alternative parameters to PERA with which to frame its determination that SVMTs are supervisory employees for purposes of collective bargaining. The Executive Director correctly looked to the statutory definition of "supervisory employee" when determining whether the SVMT position was, in fact,

[45] *Leatherbury*, 939 A.2d at 1289.
[46] 19 *Del. C.* § 1301.

supervisory.

The Executive Director also correctly declined to apply the Merit Rules in her analysis. The Merit Rules were adopted by the Merit Employment Relations Board ("MERB") as explanatory rules under the Merit System of Personnel Administration.[47] The Merit Rules define certain terms relevant to the Merit System, one of which is "casual/seasonal employees."[48] Under the Merit System, casual/seasonal employees are excluded from classified service, and are thus not governed by the Merit Rules.[49] The Merit Rules definition of casual/seasonal employee clarifies the consequences of inclusion in Section 5903(17): "Such employees are not covered by the Merit Rules. *Such employees may be covered by collective bargaining agreements* and by other State and Federal laws . . . ."[50] This clarification illustrates the General Assembly's intent that the Merit Rules apply only to the classification of Merit System employees for the purpose of pay grade, benefits and the other enumerated purposes and not to determinations of eligibility for collective bargaining under PERA.[51]

The Court must reject Council 81's contention that the stated general purpose

[47] Del. Merit R. 1.1 ("Pursuant to 20 Del. C. Chapter 59, these rules apply to initial probationary, Merit and limited term employees, except as otherwise specified, and shall continue in effect until such time as they are amended or modified by the Merit Employee Relations Board ("Board") or are amended, modified or superseded by amendment to 29 Del. C. Chapter 59.").
[48] *See* Del. Merit R. 19.0.
[49] 29 *Del. C.* § 5903(17).
[50] Del. Merit R. 19.0 (emphasis added).
[51] *See* Del. Merit R. 1.3.

of the Merit Rules that the Merit System should be "consistent with the right of public employees to organize under [PERA],"[52] somehow supports the notion that the Merit Rules must be read in all events to modify PERA. In this instance, to so hold would allow the Merit Rules to circumvent the very statutory authority that they seek to promote. Based on the foregoing, the Court is satisfied that the PERB did not err in refusing to consider the Merit Rules definition when determining whether SVMTs are supervisory employees for purposes of PERA.

C. The Executive Director's Application Of The PERA Definition Of "Supervisory Employee" Is Supported By Substantial Evidence

In *Northcrest Nursing Home*, the NLRB set forth an analysis for determining the supervisory status of an employee.[53] There, the NLRB determined that:

> [i]n determining the existence of supervisory status, the Board must first determine whether the individual possesses any of the 12 indicia of supervisory authority and, if so, whether the exercise of that authority entails "independent judgment" or is "merely routine." If the individual independently exercises supervisory authority, the Board must then determine if that authority is exercised 'in the interest of the employer."[54]

This analysis was subsequently adopted by the PERB in *Dept. Of Public Safety and*

[52] 29 *Del. C.* § 5902. *See also Laborers' Int'l Union of N. Am., Local 1029 v. State*, 310 A.2d 664, 665-67 (Del. Ch. 1973) (discussing the legislative history of the Merit System and its relationship to the collective bargaining rights established under PERA).
[53] 313 NLRB at 493.
[54] *Id.*

CWA, and is exactly the analysis undertaken by the Executive Director in this case.[55]

In applying the statutory definition, the Executive Director first looked to the class specifications of the position, as provided by the Board of Elections.[56] She then applied the analysis established by PERB in *Division of State Police Communications Section* and concluded that the SVMT position was, in fact, supervisory. In analyzing the position, she went through each of the enumerated supervisory indicators listed in the definition and determined that the first indicator applied: SVMTs assign work to the casual/seasonal employees working below them.[57] She looked to the job description provided for the SVMT position and compared that with the duties performed by a supervisor under the definition in PERA. Upon concluding that the SVMT's perform a supervisor function, she determined that they met the definition of "supervisory employee" as set forth in PERA.

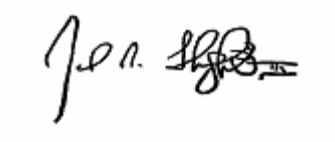
The review undertaken by the Executive Director was not cursory; she gave a detailed description of each of the twelve enumerated duties and discussed the basis for her determination that the SVMT position either did or did not perform those duties. A reasonable mind could look to her analysis and determine that there was support for her conclusion. Accordingly, it is supported by substantial evidence.

[55] *Div. of State Police Commc'ns Section*, Rep. Pet. 96-07-187, at 1548.
[56] *Determination of Eligibility*, Rep. Pet. 07-12-608(b), at 4232-33.
[57] *Id.* at 4238-43.

VI.

Neither the Executive Director nor the full PERB made an error of law in making and then affirming the decision that SVMTs are supervisory employees and, therefore, not eligible to participate in collective bargaining under PERA. Therefore, the State's Motion to Dismiss is hereby **GRANTED**.

IT IS SO ORDERED.



Joseph R. Slights, III, Judge

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